

**STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION**

Illinois Commerce Commission)	
On Its Own Motion)	
)	Docket No. 06-0187
Grant Awards From Digital Divide)	
Elimination Infrastructure Fund)	

VERIZON AVENUE CORPORATION'S PROPOSED ORDER

Pursuant to the schedule set by the Administrative Law Judge ("ALJ") at the May 18, 2006 Status Hearing, as modified by the subsequent Notice dated June 1, 2006, Verizon Avenue Corporation ("Verizon"), by and through its attorneys, hereby submits its Proposed Order in this proceeding (*see* Exhibit A).

Because Verizon's interest in this case is limited to the Commission's treatment of Verizon's own applications for Digital Divide Elimination Infrastructure Fund ("DDEIF") grants, it will not tender a full draft order for the ALJ's consideration. Instead, Verizon will rely on the other parties to propose draft language pertaining to their own applications. In addition, Verizon understands that other parties' draft orders will include background and procedural history sections, so it will not duplicate those efforts. Verizon thus limits its proposed language to that suggested in the attached proposed order.

Finally, Verizon has reviewed the Illinois Telecommunications Association's ("ITA") verified comments and draft order and concurs in ITA's recommendations regarding a bond requirement. It is appropriate for the Commission to take measures to ensure that the DDEIF funds disbursed through the award process are used properly, and that the projects for which they were awarded actually come to fruition. Because this is

the first DDEIF grant award proceeding, the Commission should take measures to set useful precedent for future proceedings. A bond requirement is an appropriate condition for the protection of the DDEIF funds that are awarded.

Dated: June 22, 2006

Respectfully submitted,

Verizon Avenue Corporation

By:



John E. Rooney
Sonnenschein Nath & Rosenthal
233 South Wacker Drive
Chicago, Illinois 60606
(312) 876-8000
jrooney@sonnenschein.com

A. Randall Vogelzang
Verizon
600 Hidden Ridge
Irving, Texas 75038
(972) 718-2170
randy.vogelzang@verizon.com

Deborah Kuhn
Verizon
205 North Michigan Avenue, 11th Floor
Chicago, Illinois 60601
(312) 260-3326
deborah.kuhn@verizon.com

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ORDER AWARDING GRANTS

By the Commission:

I. Background and Procedural History

[See language provided by other parties.]

II. Applicable Law

The legislature created the Digital Divide Elimination Infrastructure Fund (“DDEIF”) to be used by the Commission to fund the construction of “high speed data transmission facilities in eligible areas of the State.” (220 ILCS 5/13-301.3(b)). The DDEIF statute represents the legislature’s policy goal of ensuring that all areas of Illinois have access to high-speed data transmission facilities.

Because this is a case of first impression, the Commission has no precedent upon which to rely in reaching its conclusions in this proceeding. However, the legislature has given the Commission some guidance in determining what constitutes an “eligible area” under the DDEIF statute:

For purposes of determining whether an area is an eligible area, the Commission shall consider, among other things, whether (i) in such area, advanced telecommunications services, as defined in subsection (c) of Section 13-517 of this Act, are under-provided to residential or small business end users, either directly or indirectly through an Internet Service Provider, (ii) such area has a low population density, and (iii) such area has not yet developed a competitive market for advanced services.

(220 ILCS 5/13-301.3(b)).

Any entity seeking a DDEIF grant “shall demonstrate to the Commission that the grant shall be used for the construction of high-speed data transmission

facilities in an eligible area and demonstrate that it satisfies all other requirements of the Commission's rules." (220 ILCS 5/13.301.3(b)). The DDEIF statute requires the Commission to establish rules under which it will award DDEIF grants, and mandates that those rules must be consistent with the above-referenced criteria. (*Id.*).

As the DDEIF requires, the Commission promulgated administrative rules implementing the procedures to be followed in awarding DDEIF grants. These rules are codified at 83 Ill. Admin. Code Part 759. Those rules dictate that DDEIF grants shall only be used for "eligible purposes" (as set forth in 83 Ill. Admin. Code Part 759.220) within an "eligible area" of the state. (83 Ill. Admin. Code Part 759.230(a)). In considering whether an area is an "eligible area," the Commission shall consider, among other things, whether:

- 1) The area, to be served by advanced telecommunications service, as defined in Section 13-517(c) of the Act, is under-provided to residential or small business end users, either directly or indirectly through an Internet Service Provider;
- 2) The area has a low population density;
- 3) The area has not yet developed a competitive market for advanced services.

(83 Ill. Admin. Code Part 759.230(a)).

These standards echo those set forth in 220 ILCS 5/13-301.3(b). The Commission rules also set forth criteria for the Commission to assess in reviewing DDEIF grant proposals and awarding grants:

- a) The technical, financial and management resources and abilities of the applicant;
- b) The economic justification for the project, which includes the social and economic benefits of the project; and
- c) The location of the project.

(83 Ill. Admin. Code Part 759.320).

These standards collectively govern the Commission's findings in this proceeding.

III. Commission Findings on Individual Applications

A. Verizon Avenue Corporation

1. Staff Report's Recommendation

In its March 28, 2006 "Telecommunications Division Staff Report" ("Staff Report"), Staff recommended denial of Verizon Avenue Corporation's ("Verizon") DDEIF applications¹ for funding for "wireless to the rooftop" services to underserved areas of southern Illinois on two grounds: (1) that one alternative broadband provider already existed in Chatham, Highland and Rantoul, the three communities covered by Verizon's applications; and (2) project costs had been incurred "prior to grant agreement." (Staff Report at 12). Yet, Staff noted that "Verizon Avenue is without question well-qualified to construct facilities of the type sought," and is "authorized by statute to receive grant funds." (Staff Report at 12).

2. Verizon's Verified Initial Comments

In its June 5, 2006 Verified Initial Comments ("Verizon Comments"), Verizon identified several inconsistencies in Staff's treatment of Verizon's DDEIF applications as compared to those of other DDEIF applicants.

First, Verizon's applications met the applicable "under-provided" or "underserved" (the term used in the Staff Report) criteria to a greater degree than some applications for which Staff recommended approval. Specifically, several communities encompassed by the Clearwave Communications LLC d/b/a Delta Communications ("Delta"), Heartland Communications Internet Services, Inc. ("Heartland"), Illinois Rural Electric Cooperative ("IREC") and USA Broadband-El, LLC ("USA Broadband") applications are considerably larger and more economically diverse than what one would typically consider rural, and would not be considered "under-provided"/underserved.² (Verizon Comments at 5). For example, based on Verizon's research, Carbondale has six alternative providers of high-speed data transmission services (Clearwave, Verizon, MediaCom, MyChoice, Local Link, Neon DSL, and ShawneeLink), Marion has seven (Clearwave, Verizon, MediaCom, MyChoice, Local Link, Neon DSL, and ShawneeLink); Bloomington has seven (Verizon, Insight Cable, Comcast, Charter Communications, Clearwave, Insight Media, and MediaCom) and

¹ Verizon submitted separate funding requests for its Chatham, Highland and Rantoul projects.

² Many of the DDEIF grant applications were vague as to the specific communities that would be served. For example, the Heartland application identified only counties (Staff Report at 21), some of which encompassed the same communities contained in another application for which Staff recommended approval. (Verizon Comments at 5). IREC failed to identify specific towns in its application, instead listing six counties that contain over 50 communities. (*Id.*). Delta did offer city-level detail in its proposal, but a significant number of the cities that Delta proposes to serve have higher population densities than the average of the three cities covered by Verizon's proposal. (Verizon Comments at 6).

Champaign is serviced by at least one broadband Satellite company (HughesNet). (Verizon Comments at 5).

Second, although Staff recommended rejection of Verizon's applications because of the existence of a *single* alternative broadband provider in the relevant communities, Staff recommended approval of a number of DDEIF grant awards that would allow applicants to serve areas where *multiple* providers of high-speed data transmission services are already offering competitive services. (Verizon Comments at 7-9).

For example, virtually all of the cities Delta proposes to serve already have at least one provider of broadband services, and the vast majority of those cities already have two or more such providers. (Verizon Comments at 8). IREC's application identifies *five* alternative providers in the territories covered by its application – Winco, Adams Network, Cass Communications, Mediacom and Verizon. (*Id.* at 8). Yet, the Staff Report concluded, without analysis, that "IREC's proposal covers an area of Illinois not addressed by any other grant proposal, and appears to be underserved." (Staff Report at 24). The City of Sullivan's application discloses the existence of two alternative providers within the territory it wishes to serve, a wireless internet provider offering broadband service, and a CATV provider. (Verizon Comments at 8). USA Broadband cites at least three other providers operating in the territory it proposes to serve in its grant application, and states that it expects to see other wireless broadband providers enter select areas of the state. (*Id.*). Yet, Staff recommended that the Commission approve all of these applications as meeting the "under-provided"/underserved criterion.³ (Staff Report at 35-36; 39).

Based on the applications for which Staff has recommended approval, the criteria for deeming an area "under-provided"/underserved have not been applied consistently in analyzing the Verizon applications. Verizon thus urged the Commission to apply the same standard consistently as to all applicants, pointing out that if the Commission did so, it must find that Verizon's applications also would serve "under-provided"/underserved areas. (Verizon Comments at 9).

Third, Verizon's Comments addressed Staff's inconsistent approach to "retroactive funding" of DDEIF grant applications. While Staff stated that it was "not convinced that it is sound policy to retroactively fund projects that are already completed" (Staff Report at 12), Verizon explained that good public policy supports permitting applicants to seek DDEIF grant awards for projects that are *already underway*. (Verizon Comments at 10). As Verizon explained, applicants with a reasonable hope of obtaining DDEIF funding assistance and who might otherwise have embarked immediately on projects that would bring new high-

³ Staff did express some concern about the existence of the two alternatives in the Sullivan project territory, it opted to recommend approval because it believed Sullivan had "done an adequate job" of demonstrating that community needs had outpaced the existing providers' abilities to serve the community. (Staff Report at 35).

speed data transmission facilities to underserved areas of the state might delay such efforts in order to pursue DDEIF grants and obtain a decision thereon before expending resources even on the planning stages of such projects. This would be contrary to the fundamental purpose of the DDEIF, which is to bring such services to underserved areas now, as opposed to years down the road. (*Id.* at 10).

Verizon also noted the “spend first, reimburse afterwards” process set forth in 83 Ill. Admin. Code Part 759, and reminded the Commission that the Request for Grant Proposals (“RFGP”) that instituted the DDEIF grant award process was a work in progress for nearly a year. (Verizon Comments at 10-11). As explained in Verizon’s comments, representatives from Verizon and Staff discussed the anticipated timing of the issuance of the RFGP on several occasions. Based on those discussions, Verizon had every belief that the RFGP would issue prior to the completion of the projects in Chatham, Highland, and Rantoul. Verizon therefore proceeded to commence its work on those projects so that the residents in the underserved communities could realize the benefits sooner rather than later. Unfortunately, the RFGP was delayed, and Verizon completed work before the application process ended. Verizon urged the Commission not punish Verizon for timing issues that were out of its control. (Verizon Comments at 11).

Verizon asked the Commission to recognize that Staff recommended approval of the City of Sullivan’s proposal, and that proposal relied heavily on construction that had already been completed. (Verizon Comments at 11). There is no cause to reject Verizon’s DDEIF grant application due to retroactive funding concerns when the City of Sullivan’s application was granted under similar circumstances, particularly given that Verizon’s total DDEIF grant request was less than the award granted to the City of Sullivan. (*Id.* at 11-12).

Fourth, Verizon’s Comments pointed out that Staff’s reasons for denial of Verizon’s applications were inconsistent with the reasons Staff cited for the denial of other applications. Staff recommended denial of two applications because there were already multiple providers of high speed data transmission services in the relevant markets. Staff recommended denial of two other applications because those applicants had failed to provide the details required by the RFGP. The remaining recommended denial was attributed to the fact that a partner of the applicant had been recommended to receive approximately \$1 million in DDEIF funds. (Verizon Comments at 12). Verizon’s applications suffered from none of these infirmities, and were denied nonetheless.

Lastly, Verizon observed that there were ample DDEIF funds available to award Verizon its requested grant monies without jeopardizing the other recommended awards. (Verizon Comments at 13).

For all of these reasons, Verizon urged the Commission to impose a consistent application of the applicable standards, decline to adopt the Staff Report's recommended denial of Verizon's applications, and instead award Verizon DDEIF funds in the amounts requested. (Verizon Comments at 14).

3. Staff's Verified Reply Comments

Staff's June 16, 2006 Verified Reply Comments asserted that "Verizon did not provide any instance where Staff recommended retroactive funding of completed projects," and pointed out that Staff had recommended rejection of the City of Princeton's DDEIF application, which sought "retroactive funding."⁴ (Staff Reply Comments at 12). However, Staff ignored Verizon's discussion of the City of Sullivan application, which relied heavily on already-completed construction, just as the City of Princeton's proposed project did. Yet, Staff recommended approval of the City of Sullivan's DDEIF grant application. (Staff Report at 35). Staff made no effort to distinguish the two applications, only underscoring Staff's inconsistent application of the DDEIF evaluation criteria.

Staff did not attempt to refute Verizon's discussion of the detailed factual support for Verizon's contention that Staff had inconsistently interpreted and applied the "under-provided"/underserved standard. Instead, Staff claimed that Verizon failed to "show where the underserved status has been applied inconsistently between large expansive proposed territories with unserved or underserved areas, and small towns and communities that already have contiguous service." (Staff Reply Comments at 12). Staff also asserted that "Verizon also overlooked the fact that all criteria were applied to all proposals in the context of bringing the benefits of high-speed data transmission service to eligible underserved areas of the state," without explaining how this would undermine Verizon's discussion of Staff's inconsistent treatment of the import of the existence of alternative providers of high speed data transmission services in the territories to be covered by the DDEIF grant applicants' proposals.⁵ By definition, all DDEIF evaluation criteria are applied "in the context of bringing the benefits of high-speed data transmission service to eligible underserved areas of the state." This overarching context does not justify Staff's inconsistent application of the relevant criteria.

⁴ The City of Princeton's application relied heavily on pre-existing facilities to offer broadband over power lines ("BPL"). (Staff Report at 4-6). This is virtually identical to the City of Sullivan's proposal (which relied on a pre-existing fiber optic backbone), for which Staff recommended approval. (Staff Report at 32-35).

⁵ Staff appears to have misunderstood a key aspect of Verizon's discussion. Staff argues that "Verizon claims ... that Staff unfairly and illogically considered Charter and Insight cable broadband as competitive alternatives" (Staff Reply Comments at 11). Not so. Verizon's point was that Staff did not consider Chatham, Highland and Rantoul "under-provided"/underserved because a *single* cable provider offered service in these three areas, and yet found that other areas – in which there were many more alternative providers – had met the "under-provided"/underserved standard.

Staff disagreed with Verizon's policy discussion regarding what Staff has termed "retroactive funding" without acknowledging or addressing the unique facts of Verizon's situation, wherein Staff had advised Verizon that the RFGP would issue before Verizon's DDEIF project construction was completed. Yet, through no fault of Verizon's, the RFGP's issuance was so delayed that Verizon completed construction prior to the RFGP becoming available, even though Staff had advised Verizon that this would not happen. (Staff Reply Comments at 13).

Staff closed by praising Verizon for its Chatham, Highland and Rantoul projects, and stating that it would consider recommending funding of future Verizon projects in subsequent DDEIF disbursement proceedings. (Staff Reply Comments at 13).

4. Heartland Communications Internet Services, Inc.'s Verified Reply Comments

Heartland Communications Internet Services, Inc. ("Heartland") did not address Verizon's DDEIF applications in Heartland's Initial Comments, and never requested copies of the Verizon applications,⁶ but yet opposed Verizon's applications in Heartland's June 16, 2006 Verified Reply Comments. Heartland argued that because Verizon's ultimate parent company, Verizon Communications Inc., is profitable, Verizon should not qualify for DDEIF grants. Heartland offered no authority for this proposition, and ignored Staff's determination that "Verizon is authorized by statute to receive grant funds."⁷ (Heartland Reply Comments at 2-3). Heartland also disputed Verizon's discussion of the relationship between Heartland and its CLEC affiliate, Aero Communications). (*Id.* at 3).

5. Delta Communications, LLC d/b/a Clearwave Communications, LLC's Verified Reply Comments

Like Heartland, Delta Communications, LLC d/b/a Clearwave Communications LLC ("Delta") did not challenge Verizon's DDEIF applications initially, but did do so in Delta's June 16, 2006 Verified Reply Comments.⁸ Delta devoted several paragraphs of its comments to arguing that "retroactive funding requests" should be disallowed, only to turn around and assert that they actually should be permitted. (Delta Reply Comments at 9-10). Like Staff, Delta ignored the specific facts underlying Verizon's grant applications, which demonstrated that Staff had advised Verizon that the RFGP would be distributed before Verizon's projects were completed, leading Verizon to begin work timely, in keeping with the DDEIF's goals.

⁶ The parties circulated their requests for copies of specified DDEIF applications to the service list, or made them on the record. Verizon is not aware of Heartland making either form of request.

⁷ See Staff Report at 12.

⁸ Verizon is also unaware of any request by Delta for copies of Verizon's DDEIF applications.

6. Findings and Conclusions

The Commission declines to adopt Staff's recommendations regarding Verizon's DDEIF applications. Having reviewed Verizon's Verified Initial comments, as well as the Staff Report and the underlying DDEIF grant applications, the Commission agrees with Verizon that Staff inconsistently applied key evaluation standards across the spectrum of applicants – notably those involving whether the areas at issue were “eligible areas” because they were “under-provided” within the meaning of 220 ILCS 5/13-301.3(b) and 83 Ill. Admin. Code Part 759.230(a). Verizon has persuasively demonstrated that Staff recommended denial of Verizon's applications on the grounds that a single alternative provider of broadband services existed in Chatham, Highland and Rantoul, and yet recommended approval of a number of other applications for the provision of service in areas of the state already served by as many as seven alternate providers of high-speed data transmission services.

We do not designate a specific number of alternate providers that will disqualify an area from being deemed “under-provided” under the applicable statutory and administrative standards. It is appropriate for us to consider the totality of the circumstances in the course of determining whether such a fact-intensive standard has been met. However, we do hold that the existence of one alternate provider cannot, in and of itself, result in an area being precluded from qualifying as “under-provided.” We agree with Verizon that Chatham, Highland and Rantoul are under-provided to a greater extent than several of the communities covered by applications for which Staff did recommend approval, including Delta, Heartland, IREF and USA Broadband. We also agree that to the extent that the Staff recommended approval of a significant number of applications that covered territory served by two to seven alternate providers of high-speed data transmission services, it was inconsistent and improper to recommend denial of Verizon's applications on the basis of the existence of a single alternate provider in Chatham, Highland and Rantoul. Staff did not apply consistent standards in interpreting the term “under-provided,” and on reply, did not attempt to refute Verizon's detailed analysis demonstrating this. We therefore consider whether the areas to be served by the Verizon applications are “under-provided,” as Staff interpreted that term for purposes of the remaining DDEIF grant applications. Having reviewed the record developed here, we find that they are.

We also disagree with Staff's concerns (as well as similar concerns raised by other parties for the first time on reply) regarding “retroactive funding” of Verizon's projects. As Verizon noted, delays in the issuance of the RFGP prohibited Verizon from making its DDEIF grant request prior to completion of construction of the facilities it is using to offer a competitive high-speed data transmission option in several under-provided areas of the state. Had the RFGP issued when originally expected, Staff could not have recommended rejection of

Verizon's application on this basis. Verizon should not suffer because Staff advised it that the RFGP would issue on a timely basis, and Verizon relied on that information, only to see the RFGP delayed through no fault of Verizon's. Moreover, Verizon is correct that the RFGP and the pertinent statute and administrative rules contemplate a "spend first, reimburse afterwards" scenario. Indeed, our administrative rules expressly require proof of expenditure at specific levels before grant disbursement occurs. (83 Ill. Admin. Code Part 759.330(d)(1)-(3)).

In addition, Staff's concerns about "retroactive funding" in the case of Verizon's DDEIF applications cannot be resolved with Staff's recommended grant of funds to the City of Sullivan, whose application relied heavily on the use of fiber optic facilities that had already been constructed. While Staff pointed to the City of Princeton application as another instance of rejection of "retroactive funding," we do not discern a meaningful difference between the core nature of the DDEIF proposals of the City of Sullivan and City of Princeton, both of which relied upon the use of already-constructed, pre-existing telecommunications facilities. Tellingly, Staff did not attempt to address or resolve this inconsistency.

More importantly, we disagree with the underlying policy basis for Staff's concern. While the goal of the DDEIF is certainly not to reimburse providers for long-completed projects, the policy underlying the DDEIF statute is to foster the "the construction of high-speed data transmission facilities in the State"⁹ (83 Ill. Admin. Code Part 759.110). We do not want to discourage providers from embarking upon projects that meet the DDEIF goals until such time as they have applied for and obtained DDEIF grant approvals. We want to encourage these providers to initiate projects that fulfill the DDEIF statute's goals as soon as they are able, and timely apply for DDEIF funds at the earliest possible point thereafter. As Verizon noted, applicants who might otherwise have embarked expeditiously on projects that would bring new high-speed data transmission facilities to under-provided areas of the state out of a reasonable hope of obtaining DDEIF funding assistance along the way might instead delay even initial efforts if we impose a strict rule that parties must await the next RFGP process and obtain a decision approving their application before expending resources on the early stages of such projects. We do not believe it would be good public policy to punish providers who embark on ambitious projects sooner, rather than later. To this extent, we agree with Delta, although not with its efforts to prevent Verizon from obtaining DDEIF awards in this evaluation period.

For all of these reasons, we decline to adopt the Staff Report's recommendations as to Verizon Avenue Corporation, and instead approve Verizon Avenue Corporation's requests for DDEIF grant awards.

B. [Other Parties' Applications]

⁹ Another purpose is to provide accessible electronic information service to blind and disabled throughout Illinois. (83 Ill. Admin. Code Part 759.110).

IV. Bond Requirement

[See language provided by other parties.]

V. Findings and Ordering Paragraphs

The Commission, being fully advised in the premises, finds as follows:

(A) The Commission opened this docket on March 8, 2006 for the purpose of evaluating the Digital Divide Elimination Infrastructure Fund grant proposals submitted to the Commission and the awarding of those grants pursuant to 220 ILCS 5/13-301.3 and 83 Ill. Admin. Code Part 759;

(B) Seventeen parties timely submitted DDEIF grant applications;

(C) The Staff Report issued on March 28, 2006 recommended approval of nine DDEIF grant applications, and denial of the remaining eight;

(D) In its June 16, 2006 Verified Reply Comments, Staff reversed its earlier recommended denial of the City of Rock Falls' DDEIF grant application, and instead recommended approval of that application;

(E) Having reviewed the Staff Report, the underlying DDEIF grant applications, and the Parties' Verified Initial and Reply comments filed on June 5, 2006 and June 16, 2006, the Commission adopts the recommendations in the Staff Report (as subsequently modified by Staff's June 16, 2006 Verified Reply Comments) with the exception of those pertinent to Verizon Avenue Corporation's DDEIF grant applications;

(F) For the reasons stated herein, the Commission declines to adopt the Staff Report's recommendations as to Verizon Avenue Corporation, and instead approves Verizon Avenue Corporation's requests for DDEIF grant awards.

IT IS THEREFORE ORDERED that pursuant to 220 ILCS 5/13-301.3 and 83 Ill. Admin. Code Part 759, DDEIF grants are awarded to the following parties in the amounts requested in their DDEIF applications: Clearwave Communications LLC d/b/a Delta Communications; Egyptian Internet Services, Inc.; Heartland Communications Internet Services, Inc.; Illinois Rural Electric Cooperative; Mt. Vernon.Net; Northern Illinois Technology Triangle; ROC-Net Holdings, LLC; City of Rock Falls, City of Sullivan; USA Broadband-EI, LLC; and Verizon Avenue Corporation.

By Order of the Commission this ____ day of _____, 2006.

(SIGNED) CHARLES E. BOX

Chairman

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NOTICE OF FILING

Please take notice that on June 22, 2006, I caused "Verizon Avenue Corporation's Proposed Order" in the above-captioned matter to be filed electronically with the Illinois Commerce Commission via its E-Docket system.



Deborah Kuhn

CERTIFICATE OF SERVICE

I, Deborah Kuhn, certify that I caused "Verizon Avenue Corporation's Proposed Order," together with a Notice of Filing, to be served upon all parties on the attached service list on this 22nd day of June, 2006, by electronic mail.



Deborah Kuhn

**ILLINOIS COMMERCE COMMISSION
DOCKET NO. 06-0187
SERVICE LIST**

Thomas Aridas
Administrative Law Judge
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago, IL 60601
E-Mail: taridas@icc.illinois.gov

Ken Alberts
Director of Utilities
Rochelle Municipal Utilities
Northern Illinois Technology Triangle (NITT)
333 Lincoln Hwy.
PO Box 456
Rochelle, IL 61068
E-Mail: kalberts@rmu.net

Jason Bird
Superintendent of Electric
City of Princeton
Two S. Main St.
Princeton, IL 61356-1708
E-Mail: jbird@princeton-il.com

Aaron W. Brooks
Atty. for RocNet Holdings, LLC
Holmstrom & Kennedy PC
PO Box 589
800 N. Church St.
Rockford, IL 61103
E-Mail: abrooks@holmstromlaw.com

Brandy Bush Brown
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle, Ste. C-800
Chicago, IL 60601
E-Mail: bbrown@icc.illinois.gov

Ray Cagle
Chief Operating Officer
Delta Communications, LLC
d/b/a Clearwave Communications
2 N. Vine St.
Harrisburg, IL 62946-1561
E-Mail: rcagle@clearwave.com

Benjamin Clark
Project Manager
Verizon Avenue
12901 Worldgate Dr.
Herndon, VA 20170-6012
E-Mail: ben.clark@verizon.com

Dori Crow
Office Manager
Mt. Vernon.Net, Inc.
#1 Doctor's Park, Ste. H1
Mt. Vernon, IL 62864
E-Mail: dori@mvn.net

Douglas A. Dougherty
Illinois Telecommunications Association, Inc.
300 E. Monroe St., Ste. 306
PO Box 730
Springfield, IL 62705
E-Mail: ddougherty@ameritech.net

Troy A. Fodor
Atty. for Intervenor
Troy A. Fodor, P.C.
913 S. Sixth St.
Springfield, IL 62703
E-Mail: troyafodor@aol.com

E. M. Fulton Jr.
Atty. for Intervenor
Troy A. Fodor, P.C.
913 S. Sixth St.
Springfield, IL 62703

Bruce Giffin
General Manager
Illinois Rural Electric Cooperative
PO Box 80
Winchester, IL 62694
E-Mail: giffin@e-co-op.com

Barry Goodwin
Manager
USA Broadband-EI, LLC
607 S. State St.
Jerseyville, IL 62052-2366
E-Mail: barry@noww.us

William Harris
Electrical Commissioner
City of Sullivan
2 W. Harrison
Sullivan, IL 61951
E-Mail: wharris@sullivanil.us

Matthew L. Harvey
Office of General Counsel
Illinois Commerce Commission
160 N. LaSalle St., Ste. C-800
Chicago, IL 60601-3104
E-Mail: mharvey@icc.illinois.gov

ILLINOIS COMMERCE COMMISSION
DOCKET NO. 06-0187
SERVICE LIST

Nancy J. Hertel
Illinois Bell Telephone Company
Floor 25D
225 W. Randolph St.
Chicago, IL 60606
E-Mail: nw1783@sbcb.com

Karen Jackson-Furman
Director of Finance
Egyptian Internet Services, Inc.
1010 W. Broadway, PO Box 158
Steeleville, IL 62288-1312
E-Mail: kfurman@egyptian.net

Paul Jakubczak
Electrical Director
City of Rock Falls
1109 Industrial Park Rd.
Rock Falls, IL 61071
E-Mail: pjakubczak@rockfalls61071.com

Deborah Kuhn
Verizon
205 N. Michigan Ave., Ste. 1100
Chicago, IL 60601
E-Mail: deborah.kuhn@verizon.com

W. James Lally
Chief Financial Advisor
ROC-Net Holdings, LLC
605 Fulton Ave.
Rockford, IL 61103
E-Mail: jlally@eigerlab.org

Ben Moore
Owner
Yamaha of Southern Illinois
3008 S. Park Ave.
Herrin, IL 62948-3721
E-Mail: benmoore@yamahaofsi.com

Stephen J. Moore
Atty. for RocNet Holdings, LLC
Rowland & Moore LLP
200 W. Superior St., Ste. 400
Chicago, IL 60610
E-Mail: steve@telecomreg.com

Dennis K. Muncy
Atty. for Egyptian Internet Services, Inc.
Meyer Capel, a Professional Corporation
306 W. Church St.
PO Box 6750
Champaign, IL 61826-6750
E-Mail: dmuncy@meyercafel.com

Joseph D. Murphy
Atty. for Egyptian Internet Services, Inc.
Meyer Capel, a Professional Corporation
306 W. Church St.
PO Box 6750
Champaign, IL 61826-6750
E-Mail: jmurphy@meyercafel.com

Mark Ortlieb
Illinois Bell Telephone Company
25D
225 W. Randolph
Chicago, IL 60606
E-Mail: mo2753@sbcb.com

Pat Quinn
Lieutenant Governor
State of Illinois
100 W. Randolph, Ste. 15-200
Chicago, IL 60601-3220
E-Mail: pat_quinn@ltgov.state.il.us

Kevin D. Rhoda
Atty. for RocNet Holdings, LLC
Rowland & Moore LLP
200 W. Superior St., Ste. 400
Chicago, IL 60610
E-Mail: krhoda@telecomreg.com

John E. Rooney
Sonnenschein Nath & Rosenthal LLP
233 S. Wacker Dr
Chicago, IL 60606
E-Mail: jrooney@sonnenschein.com

Thomas Rowland
Atty. for RocNet Holdings, LLC
Rowland & Moore LLP
200 W. Superior St., Ste. 400
Chicago, IL 60610
E-Mail: tom@telecomreg.com

**ILLINOIS COMMERCE COMMISSION
DOCKET NO. 06-0187
SERVICE LIST**

Raymond Sinclair
President
Sincsurf, Inc
1665 S. State St.
Jerseyville, IL 62052-3609
E-Mail: ray@sincsurf.net

Gary L. Smith
Atty. for Delta Communications, LLC,
d/b/a Clearwave Communications
Loewenstein, Hagen & Smith, P.C.
1204 S. Fourth St.
Springfield, IL 62703-2229
E-Mail: lexsmith@lhoslaw.com

Robert L. Stivers
Chief Financial Officer
Aero Communications, LLC
Heartland Communications Internet Services, Inc.
1301 Broadway, Ste. 101
Paducah, KY 42001
E-Mail: rstivers@hcis.net

A. Randal Vogelzang
Verizon Services Group
600 Hidden Ridge
Irving, TX 75038
E-Mail: randy.vogelzang@verizon.com

Peter Wagner
Case Manager
Illinois Commerce Commission
527 E. Capitol Ave.
Springfield, IL 62701
E-Mail: pwagner@icc.illinois.gov

Philip J. Wood Jr.
Vice President
Public Affairs Policy & Communications
Verizon
1312 E. Empire St., ILLARA
PO Box 2955
Bloomington, IL 61702
E-Mail: philip.j.wood.jr@verizon.com

Donald L. Woods
Atty. for Illinois Telecommunications Association
2033 Lindsay Rd.
Springfield, IL 62704
E-Mail: ifimhome@aol.com